

The British constitution

Nature and sources

What is a constitution?

A constitution is a body of rules that defines the manner in which a state or society is organised. It sets out the way in which **sovereign power** is distributed between the government and the people, and between the government's constituent parts. However, no constitution can spell out exactly what should happen in every eventuality; it simply provides a framework upon which more complex rules, structures and processes can be built.

Codified and uncodified constitutions

There are two types of constitution. Those which take the form of a full and authoritative set of rules written down in a single document are said to be **codified**. Those which draw on a number of different sources — some written and some unwritten — are said to be **uncodified**.

The UK constitution falls into the latter category. Although it was once common to refer to the UK constitution as unwritten, the term 'uncodified' is more accurate because a significant proportion of what is considered to be constitutionally significant is in fact written in some form or another.

Codified and uncodified constitutions

| Type | Nature | Format | Example |
|------------|---------------|---|---------|
| Codified | Revolutionary | A single authoritative document | USA |
| Uncodified | Evolutionary | A less tangible constitution, drawing upon a range of written and unwritten sources | UK |

The main sources of the British constitution

The UK constitution is said to draw on five main sources.

(1) Statute law

Constitutional statute law consists of those Acts of Parliament that play a key role in defining the relationship between the government and the people or between different elements of government, e.g. the Human Rights Act (1998) or the Parliament Acts (1911 and 1949). Statute law is the supreme source of the UK constitution. Under the doctrine of **parliamentary sovereignty**, the passing of a new statute can make or unmake any existing law and overturn any other constitutional practice.

(2) Common law

Common law (often referred to as case law or 'judge-made law') refers to established customs and legal precedent developed through the actions of judges. Most of the traditional civil liberties available to UK citizens, including freedom of speech, were originally established in common law. The **royal prerogative** (including the power to declare war and agree treaties) is also rooted in common law.

(3) Conventions

Conventions are traditions or customs that have evolved over time and have become accepted rules of behaviour. Conventions have no real legal standing. As a result, they can easily be overturned with the passing of a parliamentary statute. As conventions merely reflect accepted practice, they can also fall into disuse as practices change. The doctrine of **cabinet collective responsibility** is rooted in convention.

(4) EU laws and treaties

Under the European Communities Act (1972), the UK incorporated the Treaty of Rome (1957) into UK law. This gave European laws and treaties precedence over our own national laws, although Parliament obviously reserves the right to repeal the 1972 Act and subsequent treaties, and thereby withdraw from the EU.

(5) Works of authority

Works of authority are scholarly texts which serve to codify practices not outlined on paper elsewhere. Although these works have only a persuasive authority, the fact that many of them have been used as constitutional references for well over 100 years affords them a certain status. Key texts include Walter Bagehot's *The English Constitution* (1867), Erskine May's *Parliamentary Practice* (first published in 1844) and A. V. Dicey's *An Introduction to the Study of the Law of the Constitution* (1885).

The status of constitutional sources

Though the UK constitution draws on a range of different sources, they do not have equal status or authority in establishing the overall constitutional settlement. Historically, statute law was said to be the supreme source of the UK constitution. In recent years, however, an expansion in the range and depth of EU laws and regulations has seen the primacy of statute law questioned.

Achieving constitutional change

Codified constitutions are usually said to be **entrenched**. This is generally because the process of formally amending the codified document is made difficult, often by requiring those seeking change to secure larger majorities (or 'super majorities') than would be needed to pass a regular statute. Many countries also require the **ratification** of constitutional proposals. In the USA, for example, amendments to the Constitution are formally proposed by two thirds of each chamber of the legislature (House and Senate) before being ratified by three quarters of the 50 US states (i.e. 38). In many European states, in contrast, constitutional amendments are confirmed by the means of a public vote or **referendum**.

Though the challenge of amending codified constitutions has often led commentators to describe them as rigid, such documents can in fact be remarkably flexible. This flexibility is provided, in part, by the judiciary, who use their interpretative power to rework ageing documents and apply them to each new age. Judgements that have significant constitutional implications are therefore often referred to as **interpretative amendments**.

Changing the UK constitution

The fact that the UK constitution is uncodified makes the process of securing even far-reaching constitutional changes somewhat easier than it is on the other side of the Atlantic. Whereas in the USA, for example, the constitutional right to bear arms entrenched in the Second Amendment has obstructed those seeking to enforce US-wide restrictions on the possession of firearms, the UK Parliament was able to impose an outright ban on handguns by means of a simple Act of Parliament, passed in the wake of the murder of 16 schoolchildren and their teacher in Dunblane in 1996.

In the same way that relatively small changes such as the ban on handguns have been brought about by passing regular statute, most major constitutional changes have been secured by similar means. Although in recent years it has become more common for such statutory changes to be confirmed and legitimised by a public referendum (e.g. as with the establishment of a Scottish Parliament in 1998), this is not always the case (e.g. as happened with Lords reform) and is certainly not a legal requirement — although it is in many EU states.

The uncodified nature of the UK constitution means that significant changes can also result from the rulings of judges (i.e. through common law) or simply as a result of changing practices (i.e. evolving conventions). In consequence, whereas codified constitutions are often said to shape political practice, the reverse can also be true in the UK.

Recent constitutional reform

Labour's return to office in 1997, following 18 years in opposition, brought the prospect of a wide-ranging programme of constitutional reform.

The party's 1997 general election manifesto promised a number of significant measures, not least the possibility of House of Lords reform and a change to the first-past-the-post (simple plurality) system under which UK general elections are held. The sheer scale of Labour's victory in 1997 — the party was returned with a 179-seat Commons majority — gave it a massive popular mandate to carry such proposals into law.

Changes during New Labour's first decade in office

For many on the liberal left, Labour's return to office in 1997 appeared to offer the prospect of an entirely new constitutional settlement, perhaps comprising:

- a codified constitution
- a UK bill of rights
- an elected upper chamber
- a more proportional system for use in elections to the Westminster Parliament
- state funding of political parties
- reform of the monarchy

Set against such high expectations, the reforms introduced by the party during its first decade in office were always likely to be judged something of a disappointment — not least because there were far too many halfway houses and unfinished projects.

That said, one should not underestimate the significant changes that were made, all of which are dealt with more fully either in later sections of this guide or in the companion guide to AQA AS Unit 1 (GOVP1).

Parliament

Lords reform saw all but 92 hereditary peers lose their right to sit and vote in the chamber (the House of Lords Act, 1999). A second stage of Lords reform stalled in 2003 when Parliament rejected all eight models for a reformed chamber. Attempts to revive the reform process in 2007 again ran aground when the Commons voted for an entirely elected second chamber and the Lords gave its support to an entirely appointed model. At the end of New Labour's first decade in power, Lords reform was still essentially where it was following the House of Lords Act (1999).

Elections and referendums

The Jenkins Commission's suggestion that AV+ should be adopted for general elections was not acted upon, though hybrid systems were instituted in other UK elections, e.g. AMS (FPTP-top up) in elections to the Scottish Parliament and Welsh Assembly. Labour made extensive use of referendums. It also established an independent **Electoral Commission** under the Political Parties, Elections and Referendums Act (PPERA, 2000). This body was charged with the task of monitoring elections, regulating party funding and expenditure, and organising referendums.

Rights

The Human Rights Act (HRA, 1998) incorporated most of the provisions of the European Convention on Human Rights into UK law. This meant that citizens could seek redress in UK courts without having to go to the European Court of Human Rights in Strasbourg. The Freedom of Information Act (FOIA, 2000) gave citizens the right to request information held by public bodies.

Devolution

A Scottish Parliament and a Welsh Assembly were established. London was given an elected mayor, a strategic authority (the Greater London Authority) and a 25-member elected assembly (the Greater London Assembly). The Northern Ireland Act (1998) established a Northern Ireland Assembly and power-sharing executive.

Influencing and limiting government powers

The uncodified and unentrenched nature of the UK constitution clearly has a bearing on whether or not it can truly limit the powers of government. In the absence of a codified constitutional document, statute law remains the highest constitutional source in the UK. In consequence, any government with a working majority in the House of Commons has the legal authority and power to reshape the constitution as it sees fit, simply by passing regular statute through Parliament.

The extent to which governments are constrained by the constitutional arrangements present in the UK will be discussed in more detail later in this guide, when we consider the power of the judiciary and the scope and extent of parliamentary power. It is, however, helpful at this stage to outline briefly the main principles of the UK constitution, which will provide the necessary context for the discussion that follows.

Principles of the UK constitution

(1) Parliamentary sovereignty

Rooted in common law, the doctrine of parliamentary sovereignty is based upon three interlocking principles:

- Parliament can make or unmake any UK law.
- Only Parliament can make UK law.
- No Parliament can bind its successors.

(2) Parliamentary government under a constitutional monarch

A parliamentary government is one in which the government operates on the basis of a mandate granted periodically through free and fair elections. In Britain, our **bicameral** Parliament operates alongside a constitutional monarch. The monarchy remains part of Parliament — technically at least ('the Queen in Parliament') — but unlike its medieval counterpart, the modern monarchy is strictly controlled in what it can do, both by statute and through convention. As a result, though the monarchy legally retains wide-ranging powers, it has long since become what Walter Bagehot referred to as a 'dignified' part of the constitution; that is to say, it has become largely symbolic or ceremonial, with its formal powers exercised by others.

(3) The rule of law

According to A. V. Dicey (1885), the rule of law has three main strands:

- First, that no one can be punished without trial.
- Second, that no one is above the law and all are subject to the same justice.
- Third, that the general principles of the constitution (e.g. personal freedoms) result from the decisions of judges (i.e. case law or common law) rather than from parliamentary statute or executive order.

(4) The unitary state

Britain is said to be a **unitary state** as opposed to a **federal** one. This means that all ultimate power in the UK is held by the central government at Westminster. Any power that local government or regional government appears to have is merely delegated or 'devolved' to it and can, in theory at least, be withdrawn at any time.

Are the constitutional principles under threat?

It is said that the passage of the European Communities Act (1972) undermined parliamentary sovereignty. This is because the Act incorporated the Treaty of Rome (1957) into UK law, thereby giving European law precedence over UK statute where the two are in conflict. Eurosceptics fear that the extension of qualified majority voting in the council of ministers further reduces the UK Parliament's ability to prevent Europe-wide policies being imposed upon UK citizens. While a UK withdrawal from the EU could be secured with the passage of a regular statute, such a move would be difficult to execute in practice.

We will return to the theme of EU law later in this guide, and consider as well the way in which developments since 1972 — not least the Maastricht Treaty (1992), the proposed EU Constitution (2004) and the Lisbon Treaty (2007) that replaced it — have added to the debate over national sovereignty.

Though Britain still has parliamentary government under a constitutional monarch, the ongoing process of parliamentary reform, the increased use of referendums since 1997, the rise of executive dominance, and increasingly savage media criticism of the royal family, have all signalled change in this area.

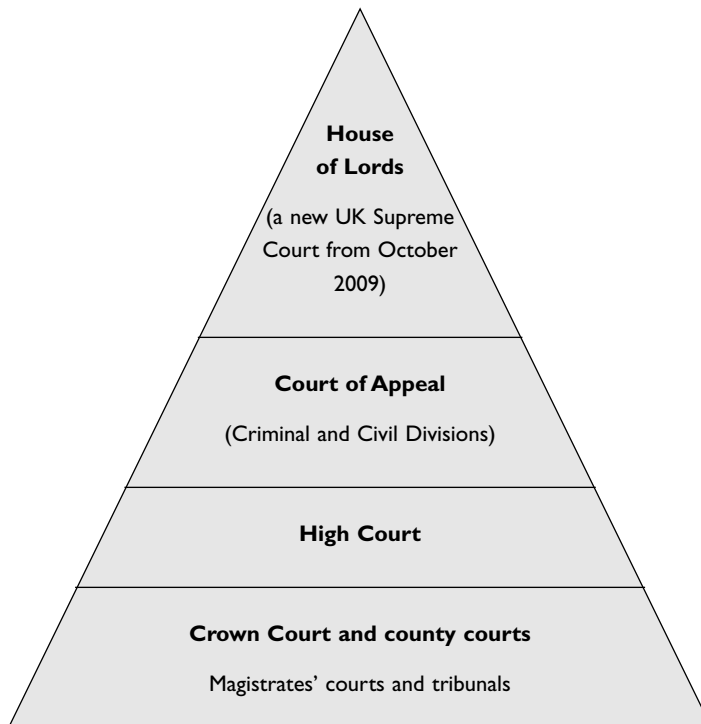
The specific limitations placed upon the rights of those accused or even suspected under the various pieces of anti-terrorist legislation is just one of the longstanding exceptions to the rule of law.

Though the UK remains, in theory, a unitary state, considerable power has been devolved to bodies such as the Scottish Parliament in such a way that it would be difficult to withdraw.

The judiciary and its relationship to other government 'powers'

The organisation of the UK judiciary

In its simplest sense, the term '**judiciary**' is a collective noun referring to all UK judges, from lay magistrates right the way up to the Law Lords. In a wider sense, it can be taken to mean all those who are directly involved in the administration and application of justice.



- Judges at all levels are involved in ensuring that justice is done and the law is properly applied.
- At the lower levels of the judiciary, the main role of judges is to preside over trials, give guidance to the jury and impose sentences.
- At the High Court level, judges hear more serious cases and can also hear cases on appeal.
- At the Court of Appeal level and above, judges are concerned with clarifying the meaning of the law, rather than just applying it. These courts can set precedent.
- Cases heard in the Court of Appeal normally result from confusion in the lower courts regarding the meaning of a law. The Court of Appeal also deals with major cases arising from the Human Rights Act (HRA, 1998).
- The Law Lords hear cases on appeal from the Appeals Court. In recent years such disputes have increasingly been brought under the HRA (1998) or under EU law. Those serving as Law Lords in October 2009 are set to become the first members of the new UK Supreme Court, located in Middlesex Guildhall.

It is the higher levels of the judiciary (i.e. the top two tiers of the pyramid) that are of most concern to politics students. This is because these higher tiers have the power to set legal precedent, thereby establishing common law; they clarify the meaning of the law as opposed to simply applying the letter of the law.

What is civil law?

Civil law is concerned with interrelationships between different individuals and groups. Civil cases generally involve matters such as wills or contracts. Most successful cases result in compensation awards.

(1) County courts

These deal with small-scale civil cases, including disputes over small contracts, wills, and many divorce cases. They are presided over by circuit or district judges.

(2) High Court

This hears more complex cases or those referred to it by county courts. The High Court has three divisions: the Queen's Bench Division, the Family Division and the Chancery Division. Its hearings are presided over by one or more High Court judge.

(3) Court of Appeal

The Civil Division of the Court of Appeal hears civil cases on appeal from lower courts.

What is criminal law?

Criminal law deals with crimes by an individual or group against the state, e.g. violent behaviour, serious fraud or burglary. Such cases are normally brought by the state and can lead to fines and imprisonment.

(1) Magistrates' courts

These hear most minor criminal cases (98% of the total). Magistrates also have the task of identifying cases that are indictable.

(2) Crown courts

These deal with more serious criminal cases and appeals from magistrates' courts.

(3) Court of Appeal

The Criminal Division of the Court of Appeal hears criminal cases on appeal from lower courts.

The Appellate Committee of the House of Lords

The House of Lords — or, more accurately, the Appellate Committee of the House of Lords — has traditionally been positioned at the apex of both the civil and criminal court hierarchies as the ultimate court of appeal within the UK judicial system. Indeed, only the European Court of Justice — and only then in matters concerning EU law — has had the power to overrule the House of Lords.

The twelve Lords of Appeal in Ordinary (the '**Law Lords**'), who sit on the Appellate Committee of the House of Lords, have traditionally performed a similar role to US Supreme Court Justices. They hear appeals referred to them by the Court of Appeal (both Criminal and Civil Divisions) and thereby clarify the meaning of contentious points of law.

In most instances, a panel of 5 of the 12 Law Lords is selected to consider a case, though it is not unheard of for additional Law Lords to be drafted in where the case

is particularly serious or complex. For example, in December 2004, an appellate committee of 9 Law Lords ruled (8:1) that the indefinite detention of suspects under the Anti-Terrorism, Crime and Security Act (2001) was incompatible with Articles 5 and 14 of the Human Rights Act (1998).

Though British politics textbooks have often referred to the House of Lords as the UK's 'Supreme Court', this label often leads to confusion — not least among those failing to grasp fully the difference between the legislative work of the upper chamber and the judicial work of the Appellate Committee. The fact that the UK's highest court of appeal is hidden within the legislature has further denied UK citizens the kind of iconic and independent Supreme Court enjoyed by those in the USA. Such issues have been addressed through the creation of a new UK Supreme Court under the Constitutional Reform Act (2005).

The new UK Supreme Court

At the start of the legal year in October 2009, the 12 Law Lords who comprise the House of Lords Appellate Committee will move to new accommodation in the renovated Middlesex Guildhall, opposite the Houses of Parliament. Though they will remain members of the Lords, they will at the same time become the first justices of the new UK Supreme Court.

The creation of a new UK Supreme Court was one of many measures set out in the Constitutional Reform Act (CRA) (2005). Under this Act the new UK Supreme Court will take on the four roles previously performed by the Law Lords:

- act as the final court of appeal in England, Wales and Northern Ireland
- hear appeals on issues of public importance surrounding arguable points of law
- hear appeals from civil cases in England, Wales, Northern Ireland and Scotland
- hear appeals from criminal cases in England, Wales and Northern Ireland (the High Court of Justiciary will retain jurisdiction over criminal cases in Scotland)

In addition, the Supreme Court will take on the role that the Judicial Committee of the Privy Council has performed in resolving disputes between the devolved governments of Northern Ireland, Scotland and Wales, and the UK Parliament. The Privy Council Committee will, however, retain jurisdiction over Commonwealth cases.

The creation of a new UK Supreme Court — benefiting from a new, independent appointments process and accommodated in a separate building — will go some way towards addressing criticisms traditionally levelled at the Lords, not least by providing for a greater separation of powers.

Judicial appointments

The **senior judiciary** comprises Lords of Appeal in Ordinary (Law Lords), Heads of Divisions, Lords Justices of Appeal, High Court judges and deputy High Court judges. Senior judicial appointments were traditionally made by the monarch on the advice of the prime minister and the Lord Chancellor. The Lord Chancellor customarily consulted serving senior judges through a process known as 'secret soundings'.

Though lower-level vacancies in the senior judiciary (e.g. for High Court judges) were advertised, the Lord Chancellor was under no obligation to appoint from among those who had formally applied. It was said that this system lacked transparency, compromised the proper separation of powers, and resulted in the senior judiciary being drawn almost exclusively from a narrow social circle: public school and Oxbridge educated, white, middle-aged men.

Reforming judicial appointments

In 2003 Labour announced plans to transfer the Lord Chancellor's power over senior judicial appointments to a new, independent **Judicial Appointments Commission** (JAC). It was hoped that these changes, brought into law by the Constitutional Reform Act (2005), might eventually result in a senior judiciary that was more representative of the broader population.

In spite of this stated intention, early indications based upon the work of the JAC suggest that the process of creating a judiciary that 'looks like the UK' might take some time. On 28 January 2008, the *Guardian* reported that the new JAC had approved 21 individuals to become High Court judges and that 10 of these had already been given posts. Of these 10:

- All were white, male, and former barristers.
- Of the nine educated in Britain, six went to leading independent schools belonging to the Headmasters' and Headmistresses' Conference (HMC).

In evidence to the Justice Select Committee in 2008, Justice Minister Jack Straw conceded that, of those recommended for judicial appointments at all levels by the JAC in its first year (2006–07):

- only 8% were from black or Asian backgrounds (compared to 14% in 2005–06)
- only 34% were women (compared to 41% in 2005–06)

In response, the JAC maintained that it has appointed 'on merit and merit alone [using] selection processes that are open and fair to all applicants, regardless of their gender, race or background'.

Appointments to the new UK Supreme Court

The first Justices of the Supreme Court will be the 12 Law Lords already in-post when the move into new accommodation happens in October 2009. Under the CRA (2005), the most senior of the 12 will take on the role of president of the Court, with the second most senior assuming the role of deputy president.

Though these 12 former Law Lords will remain members of the upper house, they will be barred from sitting and voting in the legislature for as long as they remain Justices of the Supreme Court. Those appointed subsequently to the Supreme Court will not be made members of the Lords.

Qualifications for office

To be considered for appointment as a Justice of the Supreme Court, candidates must have either:

- (1) held high judicial office for at least two years

or:

(2) been a qualifying practitioner for a period of 15 years

Qualifying practitioners are one of the following:

- holder of a Senior Courts qualification
- advocates in Scotland or solicitors entitled to appear in the Scottish Court of Session and the High Court of Justiciary
- member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland

The Selection Commission

Vacancies in the Supreme Court will be filled by a Selection Commission separate from the JAC that was created to select other members of the senior judiciary. According to Schedule 8, Part 1 of the CRA (2005), this ad hoc, five-member commission will comprise:

- (1)** the president of the Supreme Court
- (2)** the deputy president of the Supreme Court
- (3)** one member of the Judicial Appointments Commission (JAC)
- (4)** one member of the Judicial Appointments Board for Scotland
- (5)** one member of the Northern Ireland Judicial Appointments Commission

The appointments process

Though the appointments process will still involve the minister who formally holds the title of Lord Chancellor (i.e. the Justice Minister), the minister's role is to be greatly reduced.

Under this new system:

- (1)** A vacancy arises.
- (2)** A 5-member Selection Commission is convened to consider possible nominees and make a 'selection' based on merit.
- (3)** The commission submits a report to the Lord Chancellor naming a nominee.
- (4)** The Lord Chancellor has three options:
 - (a) to accept the selection by 'notifying' the prime minister
 - (b) to reject the selection
 - (c) to require the commission to reconsider its selection.
- (5)** Once 'notified' — under option (a) — the prime minister *must* recommend the approved candidate to the Queen.
- (6)** The individual is appointed a Justice of the Supreme Court when Her Majesty issues letters patent.

Although on paper this appears to leave the Lord Chancellor with considerable power as regards appointments to the new Court, the reality is rather more complicated, as he or she is not permitted to reject repeatedly names put forward by the commission. Precisely what the Lord Chancellor can and cannot do is addressed in more detail in Chapter 6 of the *2008 UK Government & Politics Annual Survey* by P. Fairclough, R. Kelly and E. Magee (Philip Allan Updates).